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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1963

185

No. [redacted]

C. C. THOMAS, Petitioner,

v.

YOUNGSTOWN SHEET AND TUBE COMPANY; WEBB & KNAPP, INC.; MURPH'S EXPRESS, a partnership; E. T. CRESSMAN; PETER B. TAYLOR; RICE'S FOOD STORE; and DAWSON, NAGEL, SHERMAN & HOWARD, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1963

No. .....

C. C. THOMAS, Petitioner,

v.

YOUNGSTOWN SHEET AND TUBE COMPANY; WEBB & KNAPP, INC.; MURPH'S EXPRESS, a partnership; E. T. CRESSMAN; PETER B. TAYLOR; RICE'S FOOD STORE; and DAWSON, NAGEL, SHERMAN & HOWARD, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

I. INTRODUCTION

COMES NOW the petitioner, by his attorneys, Allen A. Thoreen and Clayton H. Morrison, of the State of Colorado, and petition the Court for the issuance of a Writ of Certiorari to review a judgment of the United States Court of Appeals, Tenth Circuit, in the case of C. C. Thomas v. Youngstown Sheet and Tube Company; Webb & Knapp, Inc.; Murph's Express, a partnership;

E. T. Cressman; Peter B. Taylor; Rice's Food Store; and Dawson, Nagel, Sherman & Howard, No. 7286.

II. REFERENCE TO OPINIONS BELOW

The opinion of the Chief Referee in Bankruptcy, United States District Court for the District of Colorado, entered June 19, 1962 (R. 25-29), is not officially reported. The opinion of the United States District Court for the District of Colorado which was entered November 30, 1962 (R. 35-48) is reported at 211 F.Supp. 187. The opinion of the United States Court of Appeals, filed February 17, 1964 (Appendix A, *infra*, pp. 9-46), is not officially reported.

III. GROUNDS FOR JURISDICTION

The Statutory provisions relied upon as conferring jurisdiction on this Court to review the judgment or decree in question by Writ of Certiorari is 28 U.S. Code 1254 (1).

IV. QUESTIONS PRESENTED

Was the petitioner, as an alleged involuntary bankrupt, deprived of property rights accumulated during a lifetime, without due process of law, under the circumstances where (1) he was ordered by the Referee to proceed to trial before the Referee, although he had made written demand for trial by jury; (2) within minutes after being so ordered he again properly demanded a jury trial in writing; and, (3) finally obeyed the Referee's order and participated in the hearing before the Referee?

V. STATUTES INVOLVED

A. Section 19 of the Bankruptcy Act, Title 11 U.S. Code 42 reads as follows: (a) A person against whom an involuntary petition has been filed shall be entitled to have a trial by jury in respect to the question of his insolvency, except as herein otherwise provided, and of any act of Bankruptcy alleged in such petition to have been committed, upon filing a written application therefore at or before the time within which an answer may be filed. If such application is not filed within such time, the trial by jury shall be deemed to have been waived.

B. General Order 12(1), Title 11 U.S. Code, Following Section 53 reads as follows: After a general reference, all proceedings, except such as are required by the Act or the General Orders to be before the Judge, shall be had before the Referee.

VI. STATEMENT OF THE CASE.

(References are to page numbers of the consolidated record.)

This case involves C. C. Thomas, an oil and gas lease broker, hereinafter referred to as "Thomas" against whom an involuntary petition in bankruptcy was filed on August 30, 1960, by Youngstown Sheet and Tube Company, alleging that Thomas had committed two acts of bankruptcy (R. 4 and 5). On December 20, 1960, two additional creditors filed petitions to intervene and Thomas was finally served on December 23, 1960. He was ordered by the District Judge to file his Answer to the petition by December 30, 1960. After a motion to Quash the Subpoena had been heard and denied, Thomas filed his Answer on Jan-

uary 24, 1961. In that Answer he demanded a trial by jury on all issues raised by his Answer. Thereupon, on January 25, 1961, an Order of Reference was entered by the Judge of the United States District Court providing that "ORDERED that the above-entitled proceedings be referred concurrently, jointly and severally to Benjamin C. Hilliard, Jr., and J. Gordon Bartley, the Referees in Bankruptcy of this Court to take such further proceedings therein as are required and permitted by the said Bankruptcy Act, except such matters that are expressly reserved to the Judge under said Bankruptcy Act." (R. 10).

This Order was dated January 25, 1961. After intervening hearings on various matters, including the dismissal of certain creditors, the joining of others, and the striking of one allegation of the commission of an Act of bankruptcy, the matter came up before the Referee on April 5, 1962. The Referee heard the question of the qualification of the petitioning creditors and at that hearing ruled that there were sufficient qualified petitioning creditors. Whereupon, in the afternoon of April 5, 1962, the Referee ordered the parties to proceed to trial of the issue of the commission of the Act of bankruptcy. Thomas thereupon again filed his written demand for a trial by jury (R. 30) in his Amended Answer, having already done so in his original Answer. The petitioning creditors proceeded and Thomas participated in the hearings. The hearings continued to completion on April 6, 1962, and on June 19, 1962, the Referee ruled that Thomas had committed an Act of bankruptcy (R. 164). Thomas petitioned the District Judge for a review of the Referee's Order (R. 168). The District Judge, on November 30, 1962 concluded that the Referee's ruling was correct in all respects, including his order that he had jurisdiction and was auth-

orized to hear the matter of the commission of the act of bankruptcy. The District Court held that Thomas, by failing to enter objection and participating before the Referee waived his right to a jury trial (R. 190-192). The United States Court of Appeals affirmed the judgment on February 17, 1964. This Court, upon motion by the petitioner, extended the time to file the Petition for Writ of Certiorari to June 15, 1964. (Appendix B, p. 11).

VII. GROUNDS AND REASONS FOR GRANTING THE WRIT

Your petitioner submits that he has been deprived of property rights without due process of law, in a case which comes within the provisions of Rule 19(1)(a) of this Court in that the decision of the Tenth Circuit concerns a Federal question of substance, where a Court of Appeals has affirmed a decision in conflict with applicable decisions of this Court. Specifically, on the question of waiver of jury trial, the District Court relied upon the case of *Kearney v. Case*, 12 Wall. 275, 20 L.Ed. 395 (1871). In that case, this Court stated that "where a party is present by Counsel and goes to Trial before the Court without objection or exception, he has voluntarily waived his right to a jury and must be held in this Court to the legal consequences of such a waiver."

However, in *Elliott v. Toeppner*, 187 U.S. 327, 23 S. Ct. 133 (1902), a later case which applies specifically to the matter of Section 19(a) of the Bankruptcy Act, it is stated that "The right to a trial by jury, on written application thus given (by the Act) is absolute and cannot be withheld at the discretion of the Court. In that respect

it differs from the trial of an issue out of Chancery, which the Court of Equity is not bound to grant."

The decision in this case is squarely in conflict with the decision in *Elliott v. Toeppner, supra;* and with the Seventh Amendment to the Constitution of the United States which guarantees a jury trial "in suits at Common law where the value in controversy shall exceed twenty dollars;" and, the decision is in conflict with Section 19(a) of the Bankruptcy Act which guarantees a jury trial when demanded by written application. The decision of the District Court citing *Kearney v. Case, supra,* is especially in conflict with present Federal Rules of Civil Procedure. When the *Kearney* decision speaks of waiver in terms of failure of Counsel for bankrupt to utter objection or exception, it takes no note of that history which gave birth to Equity Rule 46 which provided that the rules of common law relating to exceptions to rulings of the Court were inapplicable to Equity proceedings. Compare it to the happy language in Rule 46 of the Federal Rules.

The effect of the Referee's order that the matter of the examination of the Act of bankruptcy be heard before him deprived Thelma of his property. As an oil and gas lease broker, he thereupon became unable to deal with his property for all titles were clouded. He stands financially incapacitated because the record does not reflect an uttering of his Counsel to the effect that "we object." He should be able to rely on the Rule of absolute right to a jury trial, having again demanded a jury trial in the Amended Answer, and not be held to the Referee's arbitrary order.

In view of the rising tide of bankruptcy cases which shows no signs of subsidence, it is of paramount importance that the Supreme Court of these United States define the question of the Authority of the judicial function to the Referee.

The practice has been that only judges conduct jury trials, not Referees. In *Re Eastern Supply Co.*, 197 F. Supp. 850 (W.D. Pa. 1961). Recently however, jury trials have been conducted by Referees (See 34 Journal of National Association of Referees in Bankruptcy, April, 1960 and Editorial Comment at page 60) and now, in the present Thomas case, a Referee has decided the alleged involuntary bankrupt should have no trial by jury.

The matter of Referees assuming the jury function has come to the attention of the Judicial Conference and it has been discussed by the Bankruptcy Committee of the Judicial Conference. It is the view of the Committee that if the Referee has the power to conduct jury trials, the Court is not required to and cannot control that function. The Committee thought and made the decision that it (the jury trial) should be held before the Referee. And if an alleged bankrupt is to be given due process of law, must it not be done within the framework of the Bankruptcy Act? Thus, there is present the bewildering issue of protection under the terms of the Fifth Amendment which provides that a man shall not be deprived of his property without due process of law.

VIII. CONCLUSIONS

The foregoing statements and decisions raise serious questions as to the correctness of the Thomas decision in the Tenth Circuit. Further, it is of utmost importance that this Court undertake a detailed review of the case as to the points raised herein and the broad ramifications of the principals involved in permitting a Referee to deprive a litigant of a jury trial. Wherefore your petitioner prays that this petition for Writ of Certiorari be granted so that the injustice done can be corrected.

Respectfully submitted,

[redacted]

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 7286 — January Term, 1964

[redacted]

February 17, 1964

Alba A. Pinnock and Clayton H. Morrison for Appellant.

Richard H. Shaw, of Modesitt and Shaw, for Appellee Youngstown Sheet & Tube Company.

Gerald M. Quiat, of Quiat, Seeman, Quiat & Woods, for Appellee Wehr & Knapp, Inc.

No appearance for other Appellees.

Before BREITENSTEIN and HILL, Circuit Judges, and KERR, District Judge.

PER CURIAM.

A careful examination of the record in this case and consideration of the briefs and arguments of the parties convince us that the findings and decision of the district court were correct. Accordingly, the judgment is affirmed on the basis of that court's opinion reported in 211 F. Supp. 187.

APPENDIX B

Supreme Court of the United States

No. ..... *October Term,* 1963

C. A. THOMAS, Appellant,

vs.

YOUNGSTOWN SHEET & TUBE COMPANY, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including

June 15 , 1964.

Byron R. White
Associate Justice of the
Supreme Court of the
United States.

Dated this 23rd

day of April , 1964

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No. 185

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YOUNGSTOWN SHEET AND TUBE COMPANY; WEBB & KNAPP, INC.; MURPH'S EXPRESS, a partnership; E. T. CRESSMAN; PETER B. TAYLOR; RICE'S FOOD STORE; and DAWSON, NAGEL, SHERMAN & HOWARD, Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. INTRODUCTION

The Respondent, Webb & Knapp, Inc., respectfully requests this Honorable Court deny the Petition for Writ of Certiorari for the reasons hereinafter set forth.

II. QUESTION PRESENTED

The Petitioner in his answer to an involuntary bankruptcy petition had requested that a jury determine

III. DECISION OF THE DISTRICT COURT AND CIRCUIT COURT OF APPEALS

right is not a constitutional one as counsel seem to think. It does not appear to be within the scope of the Seventh Amendment which guarantees a jury trial "in suits at common law where the value in controversy shall exceed twenty dollars." The bankruptcy proceedings is statutory in character and thus the right arises from the act itself. See Section 19 of the Bankruptcy Act, Title 11 U.S.C. Section 42. It is [illegible]

"But the record before us contains no statement that the parties agreed to submit the case to the court, nor any express statement that they waived a jury at all. The language of the judgment is "this case came up for trial . . ."

"Is this court at liberty to infer from the entry of a waiver of the right to jury trial? When we consider the cases already cited, in which such a waiver has been implied, and that the right to have a jury when a party demands it, is so universally known and perpetual, we think [illegible]

"In the case of In re Baker, 13 F.2d 119 (1926), the Ninth Circuit considered the same question, and quoted with approval the following:

"We think parties should not be permitted to play fast and loose with the courts in a manner like the present, or in a reasonable construction under the rules, that effect should be given for the first time in appellate court to the contention of the party in the trial court. We think [illegible] [illegible] [illegible]

"Ordered, Adjudged And Decreed that the determinations and judgments of the Referee shall be, and they are hereby approved and affirmed."

* * * * *

The United States Circuit Court of Appeals for the Tenth Circuit on February 17, 1961 affirmed the decision of the District Court. A copy of the Circuit Court's decision is set forth in Appendix A in the Petitioner's Brief on pages 9 and 10.

IV. STATEMENT

At a meeting of Counsel for all parties and the Referee which took place on February 9th 1961, the following Minute Order was issued by the Referee (R. 171):

"In re: Thomas No. 29017

Richard H. Shaw, Esq., Denver U.S. National Center, Denver 2, Colorado. Clayton H. Morrison, Esq., 1544 Elmira Street, Aurora 8, Colorado. Allen A. Thoreen, Esq., Majestic Building, Denver, Colorado. Gerald M. Quiat, Esq., First National Bank Bldg., Denver, Colorado. Mr. Peter B. Taylor, Meadow Brook Drive, Boulder, Colorado. Mr. E. T. Crossman, 2244 South Madison Street, Denver 10, Colorado. William P. Horan, Esq., Majestic Building, Denver 2, Colorado. Murph's Express, 1101 23rd Street, Denver 5, Colorado. Hoe's Coal Store, 2201 Kearney Street, Denver 7, Colorado.

Gentlemen: Please be advised that the order setting aside of this matter for hearing on March 7, and 8, 1961, have been vacated."

In lieu of said settings, please take notice and you are hereby notified, that at 9:30 A.M., April 5, 1962, in the Bankruptcy Court Room, Post Office Bldg., Denver, Colorado, and, if necessary, also at 9:30 A.M., April 6, 1962, in the same place, the Referee will hear all issues in this matter triable by the Referee, including determination preliminarily of the right of any party to proceed as a creditor or intervening creditor. *If it shall appear there are sufficient creditors or intervening creditors the hearing will then proceed on the merit with respect to the commission of the act of bankruptcy alleged in paragraph 7 of the original petition herein.* (Emphasis supplied.)

Yours very truly,
Benjamin C. Hilliard, Jr.
Chief Referee in Bankruptcy.

The Petitioner through his Counsel participated in the meeting which was the basis of the foregoing Minute Order.

As appears from the Record, at the hearing itself as follows, no objection was made by Counsel for the Petitioner to the hearing by the Referee on the Act of Bankruptcy (R. 110-111):

The Referee;

* * *

Now the time within which to prepare the findings and orders which I have just made will not expire until I have rendered a final decision on the matters remaining, which are within the jurisdiction of the Referee to determine.

It is therefore the order of the Referee that we proceed at this time with the testimony on the act of bankruptcy tendered by the amendment which was filed when?

Mr. Quiat: May we excuse a number of witnesses, if it please the Court?

The Referee: Just a moment, until I complete my order and you may do so.

The issue, if any, to be heard by the Referee is whether or not the alleged bankrupt committed the act of bankruptcy alleged in the amendment permitted by the order entered on March 27, 1962, and which has been adopted by the other petitioning creditors, the Referee has just found are competent to maintain this proceeding. Therefore, you may proceed now, Mr. Quiat, with your testimony on the act of bankruptcy.

Mr. Morrison: May it please the Court, --

The Referee: Yes, Mr. Morrison?

Mr. Morrison: I believe we were under an order to file our amended answer. If the Court please, counsel would like to enter a formal motion to dismiss the petition as amended on the grounds that the act of bankruptcy set forth in count six of said petition is plead insufficiently and that the respondent cannot answer and counsel is prepared to present oral argument or explanation of the law and facts in said motion.

The Referee: Let's be sure that we're talking about the same thing, Mr. Morrison. As I understand it, the remaining issue before the Court is that tend-

ered by the amendment of paragraph seven which was filed on March 27, 1962.

Mr. Morrison: Excuse me, sir, I stand corrected. I meant paragraph seven instead of paragraph six.

The Referee: And it is your position that paragraph seven amended is insufficient on its face?

Mr. Morrison: That is correct, sir.

The Referee: Very well. I'll hear you on that issue.

(Argument by Mr. Morrison.)

The Referee: And now on the record, the Referee has heard the oral motion of the adjudged bankrupt to dismiss the amended paragraph seven which was filed on March 27, 1962, which is also the subject of the second defense in the answer this day filed by Mr. Thomas; and being sufficiently advised in the premise, overrules the motion and the second defense.

You may proceed with your testimony, Mr. Quiat.

* * * *

The trial then proceeded without a jury on the question of the Act of Bankruptcy and the Referee found that the Petitioner had committed an Act of Bankruptcy.

With regard to this waiver of trial by jury, the Referee in his opinion states as follows (R. 25, 26):

* * *

Upon this state of the record the matter was on January 25, 1964, referred to the undersigned Referee (and generally, severally and concurrently to his colleague) . . . to take such further proceedings . . .

as are required and permitted by the said Bankruptcy Act . . . It is the opinion of the undersigned Referee that by this reference he was authorized and had jurisdiction to hear and determine all matters raised by the initiatory petition and the answer thereto excepting trial of the issue of insolvency, the latter issue being triable only by a Judge of the Court under Sections 1(20) and 19 of the Bankruptcy Act. *The matter has proceeded on these bases with the full understanding of and without objection by any of the parties who have appeared before the Referees since the reference.* (Emphasis supplied.)

V. ARGUMENT

Counsel had cited only one case to support his contention. That case is the case of *Elliott vs. Toeppner*, 187 U.S. 327, 23 S. Ct. 133, which he states is in conflict with the *Kearney vs. Case* case, 12 Wall. 275, 20 L.Ed. 395, which was cited by the United States District Court in the portion quoted.

There is no conflict between these cases. The matter of waiver of a jury trial was never even discussed in the *Elliott vs. Toeppner* case. There a jury trial was had on the question of the insolvency, which jury rendered a verdict of not guilty and as a result of the not guilty verdict the United States District Court entered a judgment that Toeppner was not a bankrupt and dismissed the petition. The matter was presented to the higher court and the question was has the higher court the right to redetermine the issues of fact. The Court held in an "appeal" that both matters of law and fact are examined and on a writ of error matters of law only. The matter should have

come up by writ of error and can only be reviewed for errors in instructions, the giving or refusal of instructions and the admission or rejection of evidence, all of which must appear by exceptions duly taken and preserved by bill of exceptions. This case is not in point on the question of waiver of a jury trial.

VI. CONCLUSION

As is stated before, the matter is still pending in the United States District Court for the District of Colorado for a jury trial on the question of insolvency. Clearly counsel waived a jury trial on the matter of the Act of Bankruptcy. The decision of the Referee has been affirmed by the United States District Court and the Circuit Court of Appeals and it is respectfully urged that there is no reason for granting a writ of certiorari in this particular case.

Respectfully submitted.

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Attorney for Respondent
Webb & Knapp, Inc.

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BRIEF IN REPLY TO RESPONDENT'S OPPOSITION BRIEF

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BRIEF IN REPLY TO RESPONDENT'S OPPOSITION BRIEF

I. INTRODUCTION

This brief is submitted by the Petitioner, C. C. Thomas, herein in response to the Opposition Brief to the Petition for Writ of Certiorari filed herein on behalf of Webb & Knapp, Inc., pursuant to Supreme Court Rule 24, paragraph 4.

II. QUESTIONS PRESENTED

The question presented is as set forth in the Petition for Writ of Certiorari by Thomas. That question is whether Thomas was deprived of due process of law under the circumstances where the Referee in Bankruptcy ordered him to proceed to trial of the issue of the commission of an act of bankruptcy without a trial by jury, when Thomas had demanded a jury trial in writing in his original Answer and at the instant in time of being so ordered to proceed to trial tendered to and filed with the Referee a further demand in writing for a trial by jury on the question of the commission of the act of bankruptcy; and finally after verbal objections to the procedure, obeyed the Referee's order and participated in the hearing before the Referee.

III. REFERENCE TO OPINIONS BELOW

The opinion of the Chief Referee in Bankruptcy, United States District Court for the District of Colorado, entered June 19, 1962 (R. 25-29), is not officially reported. The opinion of the United States District Court for the District of Colorado which was entered November 30, 1962 (R. 35-48) is reported at 211 F. Supp. 187. The opinion of the United States Court of Appeals, filed February 17, 1964 (Appendix A, Petition for Writ of Certiorari, pp. 9-10), is not officially reported.

IV. STATUTES INVOLVED

A. Section 19 of the Bankruptcy Act, Title 11 U. S. Code 42 reads as follows: (a) A person against whom an involuntary petition has been filed shall be entitled to have a trial by jury in respect to the question of his in-

solvency, except as herein otherwise provided, and of any act of bankruptcy alleged in such petition to have been committed, upon filing a written application therefore at or before the time within which an answer may be filed. If such application is not filed within such time, the trial by jury shall be deemed to have been waived.

B. General Order 12 (1), Title 11 U. S. Code, Following Section 53 reads as follows: After a general reference, all proceedings, except such as are required by the Act or the General Orders to be before the Judge, shall be had before the Referee.

V. ARGUMENT

Throughout the proceedings before the District Court on review and before the Circuit Court of Appeals, Webb & Knapp has distorted the question which Thomas is attempting to raise. In each brief Webb & Knapp simply reiterate the words of the District Judge, in his opinion below (Consolidated Record p. 47 at R. 190) wherein the Judge introduced the question of waiver of jury trial in order to sanction what had been done by the Referee in his Court. The District Judge, in spite of the Court Record before him, refused to acknowledge the presence of Thomas's Amended Answer demanding a trial by jury in writing on the question of the commission of an act of bankruptcy which was tendered to and filed with the Referee on the 5th day of April, 1962 at the precise instant that the Referee ordered him to trial before the Referee without a jury. (Pages 20-22 of the Consolidated Record and Appendix A to this Brief). The District Judge contends: "Attorneys for Thomas made no objection what-

soever to proceeding to hearing on April 6, 1962; furthermore, they filed a brief with the referee, which brief dealt entirely with the question of the act of bankruptcy which brief was filed on May 17, 1962." (Page 47 of the Consolidated Record and Appendix B of this Brief). The preceding statement of the District Judge is incorrect. Attorneys for Thomas did make objection to proceeding to hearing. (Page 111 of the Consolidated Record). A demand in writing for a trial by jury on the question of the commission of the act of bankruptcy was tendered to and filed with the Referee at the instant of the Referee's Order to proceed. (See Page 111 of the Consolidated Record at R-140). The District Judge refers to a brief filed on May 17, 1962, and fails to recognize that the brief he refers to is one ordered by the Referee of the parties after the hearings of April 5 and 6, 1962, and in doing so the Referee ordered that the briefs be limited to the Act of Bankruptcy. The District Judge is in error by not recognizing the written demand of Thomas for a trial by jury on the question of the act of bankruptcy in his Amended Answer tendered to and filed with the Referee at the precise instant in time that the Referee ordered the hearing to proceed on the question of the act of bankruptcy on April 5, 1962, and denying Thomas the right he had twice demanded in writing, the right of a trial by jury. Even in spite of this erroneous ruling of the District Judge, Webb & Knapp distort the issue further by attempting to apply this ruling to facts other than those on which the Judge based his decision.

The fact is that the Referee tried an issue, that of the commission of the act of bankruptcy without a jury, in spite of a written demand, when that issue is by all law, both case and statute, as well as tradition, reserved

to the District Judge. In Webb & Knapp's Opposition Brief the whole argument is that Counsel for Thomas were either dishonest or incapable, because Webb & Knapp charges, it was the Counsel for Thomas who waived the jury trial, and now refuse to admit it. (See Page 2 of the Opposition Brief). That argument is not only a distortion of the record, it is also an attempt to divert attention from the central issue.

The attorney for Webb & Knapp while before the Circuit Court of Appeals stated in his brief that Counsel for Thomas waived the jury trial at an unidentified meeting in the Referee's chambers. In the Opposition Brief before this Court (On page 2) the statement is that the waiver occurred: "At a conference prior to a hearing in the Referee's Office." On the date of this Reply Brief this meeting remains unidentified.

The Opposition Brief raises questions that have nothing to do with the Thomas Petition for Writ of Certiorari. Let this Court consider the issues raised by Thomas when he came to this Court for redress. That question is whether the District Judge erred in holding that Thomas waived his jury trial by participating in hearings before the Referee, without a jury, on April 6, 1962. It has nothing whatever to do with alleged meetings in Referee's chambers or alleged unrecorded concessions by attorneys for Thomas.

The law pertaining to the concept of waiver of trial by jury is thoroughly discussed in the Petition for Writ of Certiorari. This Reply Brief seeks only to supplement and clarify the facts which pertain to the central issue of

what happened in 1962 regarding the Thomas loss of trial by jury.

The loss of the jury trial began with a Notice sent by the Referee to all parties on January 18, 1962, wherein it was stated that a hearing was to be held by the Referee on January 29, 1962, and that the issue was to be: "To set for hearing the issues determinable by the Referee." (Page 16 of the Consolidated Record and Appendix C to this Brief). No mention was made of consideration of matters reserved to the judge, which matters include a jury trial. Therefore there could be no waiver at that point.

Pursuant to that notice a hearing was had and an order was entered setting: "Issues triable by the Referee," for hearing on March 7 and 8, 1962. (See Appendix D to this Brief).

The attorney for Webb & Knapp requested agreement from Counsel for Thomas to a change of time for the hearing to a later date as the dates of March 7 and 8 conflicted with a trip he had planned in the Carribean area, and on February 23, 1962, the Referee sent a letter to interested parties notifying them that the dates of the hearing had been changed to April 5 and 6, 1962. The Referee added these words to his letter: "If it shall appear there are sufficient creditors or intervening creditors the hearing will then proceed on the merits with respect to the commission of the act of bankruptcy alleged in paragraph 7 of the original petition herein." This letter was not, under the Bankruptcy Act, either reviewable or appealable. Thomas was helpless to do anything at this point. (See Appendix E of this Brief for Referee's letter).

On April 5, 1962, all interested parties attended the hearing, including Thomas, who had no alternative because the qualification of creditors is a proper matter for the Referee to consider. Evidence was put on regarding the qualifications of certain petitioning creditors and after the noon recess the Referee entered his order that there were a sufficient number thereof.

It is what happened at this point that the District Judge failed to consider when he introduced the idea of a waiver of a trial by jury. (See Appendix B of this Brief for the Judge's opinion on this subject). The Referee, after ruling that there were enough creditors qualified, ordered: "That we proceed at this time with the testimony on the act of bankruptcy tendered by the amendment which was filed." Precisely at that point in time, within seconds of the utterances of the Referee, Thomas tendered to and filed with the Referee his Amended Answer to the Amended Petition which again demanded in writing a trial by jury on the question of the commission of the act of bankruptcy, which is an absolute right when demanded in writing, according to Section 19 of the Bankruptcy Act.

Your Appellant cannot believe that filing a written demand for a jury trial amounts to a waiver of jury trial. The weakness of that argument is tacitly admitted by the Counsel for Webb & Knapp when they continue to try to find other basis on which to rely regarding waiver.

VI. CONCLUSIONS

Thomas's Petition for Writ of Certiorari must stand or fall on the question of whether a man can waive a jury trial by making a demand in writing therefore and then obeying thereafter an Order of the Referee to go to trial without the jury. It is of utmost importance in the preservation of justice that this Court undertake a detailed review of this case as to the points raised by the Petition for the Writ of Certiorari. Thomas is entitled to a trial by jury and this Court should so order.

ALLEN A. THOREEN,
2320 First National Bank Bldg.,
Denver, Colorado 80202

CLAYTON H. MORRISON,
1544 Elmira Street
Aurora, Colorado

Attorneys for Petitioner.

APPENDIX A

(Page 22 of the Consolidated Record)

AMENDED ANSWER TO INVOLUNTARY BANKRUPTCY PETITION

Sixth Defense

1. Respondent alleges that he was not insolvent at the time of filing of the petition or at the time any of the liens were so obtained.

Wherefore, your respondent prays that a hearing may be had on said petition and this answer, for costs made and expended, and the issues presented thereby may be determined by a jury.

C. C. Thomas
Respondent — Alleged Bankrupt

Allen A. Thoreen
Attorney for Respondent.

Clayton H. Morrison
Attorney for Respondent

(Verified)

Filed April 5, 1962.

APPENDIX B

(Page 47 Consolidated Record)

EXCERPT FROM DISTRICT JUDGE DOYLE'S OPINION

Thomas demanded a jury trial on all issues presented in his answer, but from a study of the record he did not pursue the matter. He made no objection to having the Referee hear the question of the act of bankruptcy. The intention of the Referee to try this issue was set forth in a letter dated February 25, 1962. The Referee did not call counsel's attention to the fact that Thomas had a right to a jury trial on this issue. Attorneys for Thomas made no objection whatsoever to proceedings to hearing on April 6, 1962; furthermore, they filed a brief with the referee, which brief dealt entirely with the question of the act of bankruptcy which brief was filed on May 17, 1962.

* * * *

* * * The bankruptcy proceedings is statutory in character and thus the right arises from the Act itself. See Section 19 of the Bankruptcy Act, Title 11 U. S. C., 42. It is, nevertheless, an absolute right, once a written application for it has been submitted. See Elliott v. Toeppner, 187 U. S. 327 (1902), 23 S. Ct. 133; Burns Bros. et al v. Cook Coal Co., 42 F. 2d 109 (3 Cir., 1930).

* * * *

By the Court:

William E. Doyle, Judge,
United States District Court

Entered November 30, 1962

APPENDIX C

(Page 16 Consolidated Record)

Minutes — January 18, 1962

The Chief Referee, having had under advisement the issues raised by the fourth defense of the alleged bankrupt, set up in paragraph 5 of his answer (filed January 24, 1961) to the original petition for involuntary adjudication, and having considered the record and the briefs submitted October 12 and November 22, 1961, by the alleged bankrupt; October 30, 1961, by Webb & Knapp, Inc., intervenor; November 1, 1961, by The Youngstown Sheet and Tube Co., original petitioner; and being fully advised in the premises, does Order, (1) that said fourth defense, so far as it is directed to paragraph 6 of said original petition, be and it is sustained; (2) that said original petition, so far as it is based or dependent upon said paragraph 6 be and it is dismissed but not otherwise; (3) that the intervening petitions of Webb & Knapp, Inc., Peter B. Taylor, Murph's Express, Rice's Food Store and E. T. Crossman shall be considered as asserting only and are limited to the act of bankruptcy alleged in paragraph 7 of said original petition to have been committed; and (4) that the issues determinable by the Referee and raised by said original petition (excluding said paragraph 6), shall be set for hearing on and heard by the Referee on due notice to the alleged bankrupt, The Youngstown Sheet and Tube Co., Webb & Knapp, Inc., Peter B. Taylor, Murph's Express, Rice's Food Store and E. T. Crossman.

And it is further Ordered, that the time within which a petition to review the foregoing orders, or any of them

may be filed be and it is enlarged to the tenth day following the determination by the Referee of the matters mentioned in paragraph (4) of said orders.

B. C. Hilliard, Jr.

Chief Referee in Bankruptcy.

APPENDIX D

(Page 17 Consolidated Record)

Minutes — January 29, 1962.

Pursuant to notice of January 18, 1962, the alleged bankrupt appeared this day by Clayton H. Morrison, his attorney, and Webb & Knapp, Inc., by Gerald M. Quiat, it's attorney, and the others to whom said notice went did not appear. Ordered, that the issues triable by the Referee, including any necessary determinations as to whether any intervener is in fact a qualified creditor, be and they are set for hearing in the Bankruptcy Court Room, Post Office Bldg., Denver, Colorado, on March 7 and 8, 1962, to commence each day at 9:30 A.M.

APPENDIX E

(A letter by the Chief Referee in Bankruptcy)
(Pages 17 and 18 Consolidated Record)

February 23, 1962

C. C. Thomas
No. 26617

Richard H. Shaw, Esq., Denver U. S. National Center, Denver 2, Colorado.

Clayton H. Morrison, Esq., 1544 Elmira Street, Aurora 8, Colorado.

Allen A. Thoreen, Esq., Majestic Bldg., Denver 2, Colorado.

Gerald M. Quiat, Esq., First National Bank Bldg., Denver 2, Colorado.

Mr. Peter B. Taylor, Meadow Brook Drive, Boulder, Colo.

Mr. E. T. Cressman, 2244 South Madison St., Denver 10, Colorado.

William P. Horan, Esq., Majestic Bldg., Denver 2, Colo.

Murph's Express, 1401 Zuni Street, Denver 4, Colorado.

Rice's Food Store, 2202 Kearney Street, Denver 7, Colo.

Gentlemen:

Please be advised that the order setting phases of this matter for hearing on March 7 and 8, 1962 have been vacated.

(Page 2 of the letter repeats the names of the addresses and continues)

In lieu of said settings, please take notice and you are hereby notified, that at 9:30 A.M., April 5, 1962, in the Bankruptcy Court Room, Post Office Bldg., Denver, Colorado, and, if necessary, also at 9:30 A.M., April 6, 1962, in the same place, the Referee will hear all issues in this matter triable by the Referee, including determination preliminarily of the right of any party to proceed as a creditor or intervening creditor. If it shall appear there are sufficient creditors or intervening creditors the hearing will then proceed on the merits with respect to the commission of the act of bankruptcy alleged in paragraph 7 of the original petition herein.

Yours very truly,

Benjamin C. Hilliard, Jr.

Chief Referee in Bankruptcy

jf